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No. 01-394

# In the Supreme Court of the United States

WARREN CHRISTOPHER,
FORMER SECRETARY OF STATE, ET AL., PETITIONERS

*v.*

JENNIFER K. HARBURY

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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## QUESTIONS PRESENTED

1. Whether allegations that senior State Department and National Security Council officials withheld information and intentionally misled a private citizen about their knowledge of a foreign rebel leader in the captivity of a foreign government state a violation of the constitutional right of access to the courts, when the only claim is that defendants' speech was intentionally misleading and there are no allegations that the plaintiff ever tried to file a lawsuit and was actually hindered in that effort.

2. Whether, if the Court concludes that a constitutional violation is properly grounded on allegations such as these, government officials violate clearly established law whenever they allegedly mislead a private citizen or conceal information and it is alleged that they intended to and did hinder the filing of a hypothetical lawsuit.

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

## INTEREST OF THE UNITED STATES

This case concerns a claim for damages under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against high-level federal officials, based on their alleged failure to disclose and intentional concealment of intelligence and foreign relations information informally requested by a private citizen. The United States has a significant interest in this matter because the ruling below exposes government officials to a claim for personal monetary liability if they are deemed to be less than fully forthcoming in responding to a request for assistance from a member of the public. The United States also has a substantial interest in protecting government employees from litigation that may interfere with their exercise of lawful discretion in the performance of their official functions,

especially when handling sensitive intelligence and foreign relations information.

## STATEMENT

1. Respondent, an American citizen, alleges that she was the wife of Efrain Bamaca-Velasquez, a Guatemalan national and a leader of the rebel Guatemalan National Revolutionary Union. Pet. App. 2a. Respondent asserts that Bamaca was captured, tortured, and later executed by members of the Guatemalan military, including individuals who were allegedly paid "CIA 'assets.'" *Id.* at 3a. Respondent claims that, in 1993, upon learning that Bamaca was alive and being tortured, she contacted several State Department officials and asked for information about Bamaca's status. Although the officials allegedly agreed to look into the matter, they never provided her with specific information. *Id.* at 3a-4a.

In October 1994, in response to a press report, the State Department publicly confirmed Bamaca's capture by government forces, but also reported that it had no information confirming that Bamaca was still alive. Pet. App. 4a. "[S]uspect[ing] that information was still being improperly withheld from her," J.A. 34, respondent filed Freedom of Information Act requests with the State Department, the CIA, the National Security Council, and other federal agencies in January 1995. Although the requests were expedited, she alleges that she received no documents "in the following months." Pet. App. 4a; J.A. 35. Three months later, State Department and National Security Council officials told respondent "they believed Bamaca was dead because so many years had passed without evidence that he was alive." Pet. App. 4a. Shortly thereafter, then-Congressman Torricelli asserted publicly that Bamaca had been killed



years earlier at the order of a Guatemalan army colonel who allegedly had been a paid CIA informant. *Id.* at 4a-5a.[1]

2. Respondent filed suit against various named and unnamed officials of the CIA, the State Department, and the National Security Council, seeking compensatory and punitive damages. Among her 28 causes of action, she alleged that the officials' failure to provide her with all the information in their possession, or accessible to them, violated her "Right to Meaningful Access to the Courts" under the First and Fifth Amendments. Pet. App. 7a; J.A. 49. Specifically, respondent asserted that, while Bamaca was still alive, State Department officials made "fraudulent statements and intentional omissions" about his exact whereabouts and status that prevented her from "effectively seeking adequate legal redress," J.A. 37, and that they did so because "they did not want to threaten their ability to obtain information from Mr. Bamaca," and feared "public embarrassment, censure, and/or legal liability," J.A. 31-32.

3. After ordering respondent to "put forward specific, nonconclusory factual allegations" in support of her claims, Fed. R. Civ. P. 12(e) (D. Ct. 7/20/98 Order at 1), and reviewing her submission, the district court dismissed all eight of respondent's *Bivens* counts. Pet. App. 30a-59a. The court rejected respondent's access-to-the-courts claim because she never "attempted to gain access to state-court remedies before bringing a constitutional denial of access claim," *id.* at 45a, and so her "suspicion that the alleged cover-up may

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[1] The House Intelligence Committee subsequently released a report criticizing Representative Torricelli's public release of classified information and finding "no evidence to support [his] allegations that United States Government personnel in any way directed or participated in the * * * interrogation and subsequent disappearance of Bamaca." House Perm. Select Comm. on Intelligence, 105th Cong., 1st Sess., *Report on the Guatemala Review* 3, 6 (Mar. 19, 1997); *id.* at 3 ("none of the allegations raised by Representative Torricelli * * * have proven to be true").

have prejudiced her rights to bring a separate action is nothing more than a guess," *id.* at 46a. The district court further noted that respondent "never addresse[d]" what form such a lawsuit would have taken or whether it could have been maintained. *Id.* at 47a n.4. "A cover-up to conceal evidence," the district court explained, "cannot prejudice a plaintiff's access to courts if the cause of action contemplated is untenable from the outset." *Ibid.* The court also ruled that, even if respondent's constitutional rights had been infringed, those rights were not clearly established.

4. The court of appeals reversed only the dismissal of respondent's access-to-the-courts claim. Pet. App. 1a-29a. The court acknowledged that respondent "never alleges that defendants breached a duty to disclose information to her," *id.* at 23a, but it held that petitioners' conduct nevertheless "effectively prevented her from seeking emergency injunctive relief in time to save her husband's life," *id.* at 25a, "based on an underlying tort claim for intentional infliction of emotional distress," *id.* at 24a. The court of appeals denied qualified immunity because it would "have been clear to an objectively reasonable official that affirmatively misleading [respondent] for the purpose of preventing her from filing a lawsuit would violate her constitutional rights." *Id.* at 28a.

In response to a petition for rehearing, the panel issued a supplemental opinion, Pet. App. 61a-68a, limiting its decision to situations where "defendants both affirmatively mislead plaintiffs *and* do so for the very purpose of protecting government officials from suit," *id.* at 62a. With respect to the argument that respondent had failed to "point to a colorable claim that has been prejudiced by the alleged cover-up," *id.* at 63a, the panel found it sufficient that the complaint alleged that the cover-up had "foreclosed [her] from effectively seeking adequate legal redress."

5. The court of appeals denied the petitioners' request for rehearing en banc. Pet App. 69a-70a. Judges Henderson and Sentelle dissented, *id.* at 70a-71a, on the ground that respondent "has nowhere identified what 'legal redress' might have been adequate to save her husband" from "Guatemalan nationals [operating] on Guatemalan soil" against "another Guatemalan national," *id.* at 70a. In the dissent's view, "[t]he only cause" of her inability to obtain relief "is the absence of any effective relief," *ibid.*, and, in any event, case precedent did not clearly establish any constitutional violation, *id.* at 71a.



## SUMMARY OF ARGUMENT

Respondent's complaint that, despite offers to help, high-ranking national security officials failed to disclose to her all of the sensitive information available to them about the status of her alleged husband, a Guatemalan guerrilla leader, does not state a constitutional violation, let alone a clearly established one. The right of access to the courts does not include a right to force government officials to disclose all information available to them, even when that information might preserve litigation options. Respondent purports to base her constitutional case on the First and Fifth Amendments. But while the First Amendment's Petition Clause forbids direct governmental obstruction of, or retaliation for, the presentation of grievances, this Court's cases make clear that the First Amendment does not impose any affirmative duty on the government to respond to such petitions or to provide the grist for litigation. See, *e.g.*, *Houchins* v. *KQED, Inc.*, 438 U.S. 1 (1978). The Due Process Clause likewise operates as a negative prohibition on the imposition of direct impediments to the pursuit of viable court actions. It does not saddle government officials with the affirmative duty to disclose information whenever a citizen requests it, nor, in the absence of a lawsuit, must officials facilitate the discovery of potential claims against the government. "The Constitution itself is n[ot] a Freedom of Information Act." *Id.* at 14.

Nor can respondent demonstrate that the alleged withholding of information impaired any legally viable cause of action or caused her any injury. Had it been filed, her hypothesized injunctive suit for the intentional infliction of emotional distress would have faced formidable sovereign immunity and justiciability hurdles. Respondent, however, never filed such a suit, even though a due process violation requires a concrete effort to avail oneself of existing legal remedies. Nor did respondent file a timely FOIA request. There are ample existing political, statutory, criminal law, and state tort law mechanisms for obtaining information from the government and for redressing the willful suppression, destruction, or falsification of evidence. But respondent chose not to invoke those remedies, and there is no sound justification for creating a new constitutional tort to replicate the relief they offer.

Nor do public policy considerations commend such a course. Recognition of a broad constitutional right to full disclosure in response to informal queries would stifle government-to-citizen communications and launch the courts on a prolonged course of identifying and delimiting the exceptions to and limitations on that disclosure obligation. Such delicate balancing exercises are better left to the political branches.

Even were the Court to recognize a constitutional duty of full disclosure, qualified immunity would remain appropriate because no such constitutional right was clearly established at the time petitioners acted. Moreover, even if such a constitutional right is recognized, there is no reason to infer a *Bivens* action to remedy its violation. Congress already has provided a network of interlocking statutory mechanisms for obtaining information and documents from federal agencies. Together, the Freedom of Information Act and related open government laws establish a comprehensive remedial framework that protects both the public interest in obtaining information about governmental policies and programs, and the government's need for confidentiality to protect the national security. In light of the calibrated remedial balance reflected in those statutes, there is no reason to superimpose a *Bivens* action. See *Correctional Servs. Corp.* v. *Malesko*, 122 S. Ct. 515 (2001).



## ARGUMENT

### RESPONDENT HAS NO CONSTITUTIONAL RIGHT, LET ALONE A CLEARLY ESTABLISHED RIGHT, TO FORCE CANDID DISCLOSURES OF FOREIGN AFFAIRS AND INTELLIGENCE INFORMATION

In *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court recognized an implied private cause of action for damages against federal officers in their personal capacities, where they are alleged to have violated constitutional rights under color of their federal authority. Officials sued under *Bivens*, however, enjoy qualified immunity unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982).

In evaluating a qualified immunity defense, a court must undertake two distinct inquiries. *Saucier* v. *Katz*, 121 S. Ct. 2151, 2155 (2001). The court first must decide whether the facts as alleged state a violation of a constitutional right. If they do, the court next must decide whether that right was clearly established "under settled law," *Hunter* v. *Bryant*, 502 U.S. 224, 228 (1991) (per curiam), such that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted," *Saucier*, 121 S. Ct. at 2156. Respondent's claimed denial of access to the courts fails on both fronts.

### A. The Constitutional Right Of Access To The Courts Does Not Prohibit The Government From Intentionally Withholding Information In Response To Informal Requests

Although the Constitution's text does not expressly provide a right of "access to the courts," decisions of this Court have grounded it in the First Amendment's Petition Clause, see, *e.g.*, *California Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508, 513 (1972), the Fifth Amendment's Due Process Clause, see, *e.g.*, *Murray* v. *Giarratano*, 492 U.S. 1, 11 n.6 (1989) (plurality opinion); *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 335 (1985), the Equal Protection Clause, see, *e.g.*, *Pennsylvania* v. *Finley*, 481 U.S. 551, 557 (1987), and the Privileges and Immunities Clause, U.S. Const., art. 4, § 2, Cl. 1, see, *e.g.*, *Blake* v. *McClung*, 172 U.S. 239, 249 (1898). Whatever its textual source—respondent relies on the First and Fifth Amendments (J.A. 49)—this Court's decisions make clear that it operates as a negative prohibition on governmental conduct that prevents an individual from presenting independently identified grievances to a court of law. It does not impose any affirmative duty of candor on the government or require it to provide information in response to informal requests.

The central factual allegations composing respondent's access-to-the-court claims are that, *before* Bamaca's death, several State Department officials, including the Ambassador to Guatemala, "promised to look into the matter and to assist her," but did not (J.A. 29, 30-31), even though evidence concerning Bamaca's fate allegedly was "readily available and accessible to" them (J.A. 30).[2] Thus, the crux

[2] The court of appeals viewed respondent's alleged inability to seek emergency injunctive relief as critical to her constitutional claim. Had petitioners' actions not allegedly prevented respondent from seeking emergency injunctive relief, the court of appeals indicated that it "might agree with the district court" order dismissing the case. Pet. App. 24a.



of respondent's complaint is not that government officials interposed hurdles that prevented her from filing a case in court or obstructed pending proceedings. It is that government officials "affirmatively deceived her" (Pet. App. 23a) by deliberately withholding and denying knowledge of information that, if disclosed, would have allowed her quickly to formulate a cause of action against the government for "emergency injunctive relief in time to save her husband's life" (*id.* at 25a). The claim is thus more accurately described, not as denying her access to the courts, but as denying her timely access to information that in some unexplained fashion might have inspired her to file some form of lawsuit that might, in turn, in some unexplained way, have prevented Bamaca's execution by Guatemalan soldiers. No such amorphous and illusory right exists in the Constitution.

#### 1. The Intentional Withholding of Information in Response to an Informal Citizen Request Does Not Violate the First Amendment

Both history and precedent establish that the First Amendment right to petition the government for redress of grievances is a purely negative protection against governmental obstruction; it does not impose any affirmative obligations on the government to respond or police the content of its response. The First Amendment's Petition Clause traces its roots to the English Bill of Rights of 1689, which created the right as an entitlement to air grievances and a protection against retaliation for doing so. The Bill of Rights declared that "it is the right of the subjects to petition the King, and all committments and prosecutions for such peti-

Thus, although the complaint contains allegations concerning statements made by petitioners "After Her Husband's Extrajudicial Execution" (J.A. 32), those statements could not have impeded her ability to seek emergency relief that could have saved Bamaca's life. In any event, those statements do not differ substantively from those preceding Bamaca's death and thus do not alter the legal analysis.

tioning are illegal." 1 W. & M., 2d Sess., ch. 2, § 5 (Eng.). The Continental Congress likewise couched the right largely in terms of a protection against retaliation: "That they have a right peaceably to assemble, consider of their grievances, and petition the king; and that all prosecutions, prohibitory proclamations, and commitments for the same, are illegal." 5 *The Founders' Constitution* 199 (P. Kurland & R. Lerner eds., 1987). The text of the First Amendment reflects those historical roots by protecting "the right to petition the Government for a redress of grievances." U.S. Const. Amend. I. That protection is fundamental because "the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *Eastern R.R. Presidents Conf.* v. *Noerr Motor Freight Inc.*, 365 U.S. 127, 137 (1961).

Although the Constitution thus guarantees the right to voice grievances, this Court's cases interpreting the Petition Clause consistently have eschewed employing it to regulate the government's response to petitions or creating a right of access to information. In *Minnesota State Board for Community Colleges* v. *Knight*, 465 U.S. 271 (1984), the Court stressed that, while the First Amendment empowers individuals to "petition openly" and protects them "from retaliation for doing so," the Petition Clause "does not impose any affirmative obligation on the government to listen [or] to respond." *Id.* at 286 (internal quotation marks omitted).

Indeed, this Court has recognized that "[t]here is no discernible basis" in the First Amendment "for a constitutional duty to disclose, or for standards governing disclosure of or access to information." *Houchins* v. *KQED, Inc.*, 438 U.S. 1, 14 (1978). Nor is there a "constitutional right to have access to particular government information, or to require openness from the bureaucracy." *Ibid.* (internal quotation marks omitted). "The Constitution itself is n[ot] a Freedom of In-



formation Act." *Ibid.* While respondent undoubtedly had a First Amendment right to bring her concerns, whatever they might be, to the attention of government officials, "[i]t is quite another thing to suggest that the Constitution imposes upon government the affirmative duty to make available to [respondent] sources of information" about foreign relations and foreign intelligence operations "not available to members of the public generally." *Pell* v. *Procunier*, 417 U.S. 817, 834-835 (1974). "That proposition finds no support in the words of the Constitution or in any decision of this Court." *Ibid.*

That respondent allegedly desired the information to facilitate the prosecution of some form of lawsuit does not alter the analysis. The laws governing discovery of information needed for litigation "are a matter of legislative grace," not constitutional compulsion. *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 32 (1984). A "litigant has no First Amendment right of access to information made available only for purposes of trying his suit." *Ibid.* By the same token, respondent cannot wring out of the First Amendment a right to extra-judicial, pre-litigation discovery from the government of information relevant to formulating a cause of action against the government.

**2. The Intentional Withholding of Information in Response to an Informal Citizen Request Does Not Violate the Due Process Clause**

**a.** Respondent's arguments fare no better under the Due Process Clause. In *Lewis* v. *Casey*, 518 U.S. 343 (1996), this Court addressed the due process right of access to the courts and expressly "disclaim[ed]" any "suggest[ion] that the State must enable [individuals] to *discover* grievances." *Id.* at 354. Rather than obliging the government to provide information and materials that would allow individuals "to transform themselves into litigating engines," *id.* at 355, the right of access to the courts only empowers an individual "to bring to

court a grievance that the [individual] wishe[s] to present," *id.* at 354.

Likewise, *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), stressed that the right of access to the courts founded in the Due Process Clause simply "assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." *Id.* at 579. Thus the right of access to the courts "has not been extended by this Court to apply further than protecting the ability of an inmate to prepare a petition or complaint." *Id.* at 576. Nothing in the Court's opinion in *Wolff* suggested that the government must also provide—or refrain from withholding—the grist for the complaint. Once litigation is commenced, certain statutes and the Federal Rules may obligate the government to comply with discovery requests, but prior to the initiation of a lawsuit, the government is under no obligation to respond to informal requests for information in a way that preserves the individual's unarticulated litigation options. And the constitutional analysis does not change just because a government official promises to look into a matter and get back in touch.[3]

*Casey*'s and *Wolff*'s recognition that the right of access imposes no affirmative duty on government to facilitate the identification of causes of action is consistent with the historical genesis of that right in the Privileges and Immunities Clause. See, *e.g.*, *Blake* v. *McClung*, 172 U.S. 239, 249 (1898) (Privileges and Immunities include the right "to institute

[3] The Due Process Clause does impose a specialized and limited duty of disclosure in the context of criminal prosecutions. See *Brady* v. *Maryland*, 373 U.S. 83 (1963). The far-reaching duty of disclosure that respondent seeks to impose broadly on all governmental actors far exceeds anything that criminal defendants are entitled to under *Brady*. Cf. *Kyles* v. *Whitley*, 514 U.S. 419, 436-437 (1995) ("[T]he Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense.").



and maintain actions of any kind in the courts of the state").[4] Many of the earliest due process and equal protection cases likewise focused on governmentally imposed structural impediments to the presentation of a complaint to a court of law. See, *e.g.*, *Ex parte Hull*, 312 U.S. 546, 549 (1941) (State may not condition the right to apply to a federal court for a writ of habeas corpus on approval by the warden).[5]

The Court's analysis in *Casey* and *Wolff* applies with greater force here. Those cases arose in the prison context, where the government literally interposes significant physical and informational barriers between the inmate and the courts. The rights of a free citizen, who suffers from no commensurate restrictions, to governmental assistance in identifying potential causes of action cannot be greater than the prisoners who do face those obstacles.

**b.** In finding that respondent had properly alleged a denial of access to the courts, the court of appeals relied primarily not on decisions of this Court, but on lower court decisions holding that law enforcement officials may infringe the right of access to courts when they cover-up their own or their co-workers' wrongdoing. For example, in *Bell* v. *City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984), police officers attempted to cover-up an improper shooting by planting a knife on the victim and lying to the victim's relatives,

[4] See also *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1872) ("right of free access to * * * courts of justice in the several States"); *Corfield* v. *Coryell*, 6 Fed. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3230) (Washington, Circuit Justice) (right to "institute and maintain actions of any kind in the courts of the state").

[5] See also *Johnson* v. *Avery*, 393 U.S. 483, 487 (1969) (active interference with preparation of legal documents that "effectively" forbids "prisoners to file habeas corpus petitions"); *Smith* v. *Bennett*, 365 U.S. 708, 713-714 (1961) (waiver of filing fee for habeas corpus petitions based on indigency); *Burns* v. *Ohio*, 360 U.S. 252, 258 (1959) (same, with respect to docket fees, because the rule "completely bar[s] the petitioner from obtaining any review at all").

causing them to accept a *de minimis* settlement from the city. *Id.* at 1261-1262. In *Ryland* v. *Shapiro*, 708 F.2d 967 (5th Cir. 1983), a coroner and a district attorney covered up a murder committed by a fellow prosecutor by falsifying records to reflect that the victim had committed suicide. *Id.* at 969-975.

The willful destruction and falsification of evidence in *Bell* and *Ryland* were, of course, inexcusable and unlawful on many fronts. But the conduct at issue here—an alleged lack of forthrightness in voluntarily responding to a private citizen's informal requests for information—hardly constitutes that sort of "cover-up."

More fundamentally, not every wrongful action of a government official is unconstitutional. *County of Sacramento* v. *Lewis*, 523 U.S. 833, 845 n.7 (1998) (the common law "made many things unlawful, very few of which were elevated to constitutional proscriptions"). The traditional understanding and operation of the right of access to the courts as a right to institute and maintain legal actions bears little logical connection to those isolated instances of unlawful, extra-judicial misconduct designed to deny justice in a particular situation. Moreover, there is no need to contort constitutional doctrine to redress, through a new constitutional tort, conduct that already is criminally and civilly actionable. The criminal law punishes and deters precisely such behavior.[6] Tort law also provides remedies. In addition to tort actions for the officers' underlying conduct (such as wrongful death), independent tort suits for the spoliation of

[6] See, *e.g.*, 18 U.S.C. 1001 (1994 & Supp. V 1999) (falsification of records); 18 U.S.C. 1510 (1994 & Supp. V 1999) (obstruction of federal criminal investigations); 18 U.S.C. 1511 (obstruction of state and local law enforcement); 18 U.S.C. 1512 (1994 & Supp. V 1999) (witness tampering); 18 U.S.C. 1621-1623 (perjury, subornation of perjury, and false declarations).



evidence, fraudulent concealment, or impairment of the right to sue may also be available.[7]

Once an individual commences litigation, ordinary discovery processes and sanctions provide adequate means of obtaining information relevant to the litigation and policing cover-ups or failures to disclose. Where evidence is lost or prejudiced due to the passage of time or the destruction of documents, courts can resolve such matters in favor of the plaintiff under local rules of evidence and procedure.[8] Where

[7] See, *e.g.*, *Swekel* v. *City of River Rouge*, 119 F.3d 1259, 1264 (6th Cir. 1997), cert. denied, 522 U.S. 1047 (1998); *Hibbits* v. *Sides*, 34 P.3d 327 (Alaska 2001); *Rosenblit* v. *Zimmerman*, 766 A.2d 749, 757-758 (N.J. 2001); *Fada Indus., Inc.* v. *Falchi Bldg. Co.*, 730 N.Y.S.2d 827, 831 (Sup. Ct. 2001); *Wal-Mart Stores, Inc.* v. *Goodman*, 789 So.2d 166, 176 (Ala. 2000); *Guillory* v. *Dillard's Dep't Store, Inc.*, 777 So.2d 1 (La. Ct. App. 2000); *Oliver* v. *Stimson Lumber Co.*, 993 P.2d 11 (Mont. 1999); *Holmes* v. *Amerex Rent-A-Car*, 710 A.2d 846 (D.C. 1998); *Thompson* v. *Owensby*, 704 N.E.2d 134 (Ct. App. 1998), transfer denied, 726 N.E.2d 304 (Ind. 1999); *Boyd* v. *Travelers Ins. Co.*, 652 N.E.2d 267 (Ill. 1995); *Coleman* v. *Eddy Potash, Inc.*, 905 P.2d 185 (1995), overruled on other grounds, 34 P.3d 1148 (N.M. 2001); *Smith* v. *Howard Johnson Co.*, 615 N.E.2d 1037 (Ohio 1993); *Weigl* v. *Quincy Specialties Co.*, 601 N.Y.S.2d 774 (Sup. Ct. 1993); *Foster* v. *Lawrence Mem'l Hosp.*, 809 F. Supp. 831, 838-839 (D. Kan. 1992); *Federated Mut. Ins. Co.* v. *Litchfield Precision Components, Inc.*, 456 N.W.2d 434 (Minn. 1990); *Miller* v. *Allstate Ins. Co.*, 573 So.2d 24 (Dist. Ct. App. 1990), review denied, 581 So.2d 1307 (Fla. 1991); *La Raia* v. *Superior Court*, 722 P.2d 286 (Ariz. 1986); *Hutchins* v. *Utica Mut. Ins. Co.*, 484 N.Y.S.2d 686 (App. Div. 1985); see also *Henry* v. *Deen*, 310 S.E.2d 326 (N.C. 1984) (recognizing "civil conspiracy" to destroy records and create false records); see generally S. Nolte, *The Spoliation Tort: An Approach to Underlying Principles*, 26 St. Mary's L.J. 351 (1995). Restrictions on the assertion of tort claims against the government, see, *e.g.*, Westfall Act, 28 U.S.C. 2679(d), might limit the ability of a litigant to recover on such tort claims. That, however, is a function of long-established principles of sovereign immunity, rather than a denial of access to the courts.

[8] See, *e.g.*, *Foster* v. *City of Lake Jackson*, 28 F.3d 425, 431 n.9 (5th Cir. 1994); *Coates* v. *Johnson & Johnson*, 756 F.2d 524, 551 (7th Cir. 1985) ("bad faith destruction of a document relevant to proof of an issue at trial

fraud is discovered after the litigation concludes, the case may be reopened. See, *e.g.*, Fed. R. Civ. P. 60(b).[9]

The government's obligation under the Federal Rules of Civil Procedure to respond to discovery requests once litigation commences is quite different from a perpetual, generalized constitutional duty to provide information before litigation begins at the behest of any public requestor. If a member of the public wishes to impose a legally enforceable duty of disclosure on the government, Congress has provided a formal mechanism for doing so in the Freedom of Information Act, 5 U.S.C. 552. To be sure, in responding to a FOIA request, the government may invoke several well-

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gives rise to a strong inference that production of the document would have been unfavorable to the party responsible for its destruction"); *Goff* v. *Harold Ives Trucking Co.*, 27 S.W.3d 387, 391 (Ark. 2000); *Stender* v. *Vincent*, 992 P.2d 50, 57 (Haw. 2000); *Meyn* v. *State*, 594 N.W.2d 31, 34 (Iowa 1999); *Cedars-Sinai Med. Ctr.* v. *Superior Court*, 954 P.2d 511, 521 & n.4 (Cal. 1998); *Kippenhan* v. *Chaulk Servs., Inc.*, 697 N.E.2d 527 (Mass. 1998); *Schroeder* v. *Commonwealth*, 710 A.2d 23, 26-27 & n.5 (Pa. 1998); *Trevino* v. *Ortega*, 969 S.W.2d 950, 952 (Tex. 1998); *Lauren Corp.* v. *Century Geophysical Corp.*, 953 P.2d 200, 204 (Colo. Ct. App. 1998); *Monsanto Co.* v. *Reed*, 950 S.W.2d 811, 815 (Ky. 1997); *Souza* v. *Fred Carries Contracts, Inc.*, 955 P.2d 3 (Ariz. Ct. App. 1997); *Bachmeier* v. *Wallwork Truck Ctrs.*, 544 N.W.2d 122, 126 (N.D. 1996); *Henderson* v. *Tyrrell*, 910 P.2d 522, 531-532 (Wash. Ct. App. 1996); *Brown* v. *Hamid*, 856 S.W.2d 51, 57 (Mo. 1993); *DeLaughter* v. *Lawrence County Hosp.*, 601 So.2d 818, 821-822 (Miss. 1992); *Miller* v. *Montgomery County*, 494 A.2d 761, 768 (Ct. Spec. App.), cert. denied, 498 A.2d 1185 (Md. 1985); *Hay* v. *Peterson*, 45 P. 1073, 1076 (Wyo. 1896); see generally Fed. R. Civ. P. 37 (sanctions for failure to comply with discovery). Where the misconduct delays discovery of the injury, equitable estoppel may be available. See, *e.g.*, *Bell*, 746 F.2d at 1255 ("the defendants' concealment of the truth precludes the application of *res judicata* and the statute of limitations").

[9] The Constitution also establishes political checks on the responsiveness of government officials. Respondent's allegations have been the subject of both congressional and media scrutiny, and citizens retain the power to vote out of office government officials deemed to be insufficiently forthright or cooperative.



defined exemptions, including one for national security. 5 U.S.C. 552(b)(1). But the existence of those statutory exemptions simply underscores the folly of creating a constitutional right to litigation-enabling information through informal requests. In administering such a constitutional right to government information, "hundreds of judges," guided only by silent constitutional text, would be left "at large" either to replicate and constitutionalize Congress's FOIA exemptions or "to fashion ad hoc standards, in individual cases, according to their own ideas of what seems 'desirable' or expedient." *Houchins*, 438 U.S. at 14.

Respondent chose to take only limited advantage of FOIA. She delayed making any FOIA request for two years, until the time when, even under her theory, emergency injunctive relief was no longer viable. When she did file her FOIA requests with the State Department, the CIA, the National Security Council, and numerous other federal agencies, she was granted expedited processing (see J.A. 34-35), and received a large number of responsive documents.[10] Had respondent "filed her FOIA requests immediately," the court of appeals concluded (Pet. App. 24a-25a)—and respondent apparently agrees (Br. in Opp. 19 n.4)—she could have "obtain[ed] the information" she claims was "necessary to

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[10] The Department of Defense provided 38 documents within five months. Intelligence Oversight Bd., *Report on the Guatemala Review* 42 (June 28, 1996). The CIA provided 105 documents by February 1996, and approximately 300 in total. *Ibid.* Although, as an advisory entity within the Executive Office of the President, the National Security Council is not subject to FOIA, see *Armstrong* v. *Executive Office of the President*, 90 F.3d 553 (D.C. Cir. 1996), cert. denied, 520 U.S. 1239 (1997), the Council informs us that it responded to her request within six months by releasing 58 documents, and that it released an additional 49 documents two months later. The State Department advises that, from June 1995 (six months after her request) to May 1997, it released more than one thousand documents to respondent and, by November 1997, had released more than 2700 documents in whole or in part.

seek an injunction in time to save her husband's life." Respondent now seeks to lay responsibility for the delay at the feet of the government (Pet. App. 24a-25a), but that delay resulted from her voluntary choice. FOIA requests can be filed at any time, by any person, for any reason, without any prerequisite showing of knowledge or need. Respondent chose to forgo that statutory remedy, and to seek information solely through informal contacts with government officials. Those informal channels and FOIA, however, are not mutually exclusive. In any event, respondent's "fail[ure] to pursue aggressively all of [her] legal remedies in the face of what is admittedly a novel legal situation cannot be the basis for visiting liability upon the [petitioners]." *Crowder* v. *Sinyard*, 884 F.2d 804, 815 (5th Cir. 1989), cert. denied, 496 U.S. 924 (1990).

In short, there is no need to convert the Due Process Clause into a Freedom of Information Act, a civil discovery rule, an obstruction of justice law, or a state tort law. Doing so would ignore the Court's "frequent admonition that the Due Process Clause is not merely a 'font of tort law.'" *College Sav. Bank* v. *Florida Prepaid PostSecondary Educ. Expense Bd.*, 527 U.S. 666, 674 (1999) (quoting *Paul* v. *Davis*, 424 U.S. 693, 701 (1976)). Moreover, challenges like those asserted here against high-level "[E]xecutive [Branch] action * * * raise a particular need to preserve the constitutional proportions of constitutional claims." *Lewis*, 523 U.S. at 847-848 n.8.

c. Respondent's due process claim suffers from an additional infirmity: she has failed to demonstrate any "actual injury." *Casey*, 518 U.S. at 349; see also *Crawford-El* v. *Britton*, 523 U.S. 574, 593 (1998) ("proof of an improper motive is not sufficient to establish a constitutional violation —there must also be evidence of causation"). Respondent never filed, or even identified, any legally viable claim that was prejudiced by the alleged withholding of information.



See *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731, 742-743 (1983) (right of access to the courts protects only "well-founded" lawsuits that have a "reasonable basis" in fact or law). Respondent's complaint asserts in vague terms only that officials deceived her in order to avoid "public embarrassment, censure and/or legal liability," J.A. 32, and that the "concealment * * * foreclosed her from effectively seeking adequate legal redress" to prevent Bamaca's execution, J.A. 44. At oral argument before the court of appeals, respondent's counsel "clarified" that, but for the nondisclosures, respondent "could have sought an emergency injunction based on an underlying tort claim for intentional infliction of emotional distress." Pet. App. 24a. No explanation was given as to how or why that tort suit would have prevented the execution of Bamaca by Guatemalan soldiers, however.

Furthermore, even assuming that the argument of counsel may substitute for the allegations of the complaint, no such tort action lies against the United States. The Federal Tort Claims Act excludes such claims. See 28 U.S.C. 2680(h) (intentional torts excepted, including claims arising out of "misrepresentation");[11] 28 U.S.C. 2680(k) (exception for claims arising in a foreign country). Nor does that Act authorize injunctive relief.[12] More fundamentally, the claim

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[11] See also *Block* v. *Neal*, 460 U.S. 289, 296 (1983) ("the essence of an action for misrepresentation, whether negligent or intentional, is the communication of misinformation on which the recipient relies"); *Thomas-Lazear* v. *FBI*, 851 F.2d 1202, 1207 (9th Cir. 1988); *Metz* v. *United States*, 788 F.2d 1528, 1534-1535 (11th Cir.), cert. denied, 479 U.S. 930 (1986).

[12] See 28 U.S.C. 1346(b)(1) (Supp. V 1999); *Hatahley* v. *United States*, 351 U.S. 173, 182 (1956); *Talbert* v. *United States*, 932 F.2d 1064, 1065-1066 (4th Cir. 1991); *Edelman* v. *Federal Hous. Admin.*, 382 F.2d 594, 596-597 (2d Cir. 1967); see also 5 U.S.C. 702; *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689-695 (1949). But see *U.S. Information Agency* v. *Krc*, 989 F.2d 1211 (D.C. Cir. 1993), cert. denied, 510 U.S. 1109 (1994).

is illusory, for it apparently would seek to have a federal court order Executive Branch foreign policy and intelligence officials to direct a foreign government to alter its treatment of one of its own citizens engaged in active rebellion against that government. No such justiciable cause of action or remedial power exists. See, *e.g.*, *Department of the Navy* v. *Egan*, 484 U.S. 518, 529-530 (1988) ("foreign policy [is] the province and responsibility of the Executive"); *Chicago & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) ("[T]he very nature of executive decisions as to foreign policy is political, not judicial."). See generally *Totten* v. *United States*, 92 U.S. 105 (1875).[13]

The right of access to the courts, moreover, is functionally a right to judicial process. For this reason, the lower courts that have recognized a right-to-access violation in the context of a government cover-up generally have done so when the plaintiff actually attempted to file a lawsuit, and several courts have treated the filing of such a lawsuit as an indispensable predicate of the claim. See *Swekel* v. *City of River Rouge*, 119 F.3d 1259, 1264 (6th Cir. 1997) (unless a plaintiff makes "some attempt to gain access to the courts * * * how is this court to assess whether such access was in fact 'effective' and 'meaningful'?"), cert. denied, 522 U.S. 1047 (1998); *Vasquez* v. *Hernandez*, 60 F.3d 325, 329 (7th Cir. 1995) (availability of state tort action precludes denial of access to the courts claim), cert. denied, 517 U.S. 1156 (1996).

Such a requirement is appropriate because, like analogous Fifth Amendment rights, a constitutional violation does not occur unless and until it is shown that respondent was incapable of seeking redress from the courts.[14] In addition, the

[13] See also *Sovereign Immunity: Hearings Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 135 (1970).

[14] See, *e.g.*, *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 195 (1985) (violation of the Just Compensation Clause "is not 'complete'" until "the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State"); *Hudson* v. *Palmer*, 468 U.S. 517, 533 (1984) (State's deprivation of property "is not complete until and unless it provides or refuses to provide a suitable postdeprivation remedy").



actual or attempted lawsuit gives the court a concrete, nonspeculative basis for evaluating whether there was ever a viable lawsuit to present to the courts. In the absence of any predicate lawsuit, respondent asks this Court to speculate as to whether she ever could have pled a case that could have overcome the patent justiciability, sovereign immunity, and national security barriers to her claim, and to declare that her purely hypothesized lawsuit was unconstitutionally frustrated solely by petitioners' allegedly misleading responses to informal requests for information. Cf. *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1092 (1991) (noting "[h]indsight's natural temptation to hypothesize" litigable injury); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 735 (1975) (requiring concrete injury that is not amenable to "subjective hypothesis" to cabin scope of implied cause of action). Such conjecture provides a tenuous basis for the development of constitutional jurisprudence.

### 3. The Court of Appeals' Rule Would Significantly Chill and Disrupt Communications Between Citizens and Government Officials

On a daily basis, countless Members of Congress, Executive Branch officials, and other government personnel respond to an endless stream of inquiries and requests for information from constituents, the press, and the general public. That constant dialogue and flow of information between government and the governed advances core principles of a democratic society by enhancing the knowledge of government decisionmakers, promoting governmental responsiveness to the public, identifying problems and

solutions for governmental action, and encouraging citizen involvement in the political process.

The court of appeals' decision threatens to paralyze such interchanges. Officials frequently must advise a requester that investigation is necessary before responding further. Resource limitations, rules governing privileged or classified material, or simple human oversight may often prevent a comprehensive response to public inquiries. The court of appeals' decision would transform such responses into potential deprivations of unarticulated constitutional rights, which put the responding government officials at risk of personal liability for compensatory and punitive damages.

Unlike FOIA requests or court orders, which place a contextually limited duty on government officials to provide information, the decision below imposes a free-floating duty in response to virtually any request. The court's rule presumably would extend beyond requests for foreign affairs and intelligence information, to requests by criminal defendants, targets of law enforcement investigations, and prisoners. Criminal defendants might contend that any deceptive statements or "omissions" made by law enforcement officers in an investigation somehow deprived them of their due process rights in the subsequent prosecution. Cf. *Illinois* v. *Perkins*, 496 U.S. 292, 297 (1990) ("Ploys to mislead a suspect or lull him into a false sense of security," without more, do not violate *Miranda*.). Prisoners could add this weapon to their arsenal by seeking information about prison guards, prison security practices, informants, and other inmates, which they could well insist is somehow pertinent to pending or potential lawsuits. Nor would the rule logically be limited to requests for information about the government—the decision logically implicates any government failure to provide information about third parties concerning, for example, contract or trade disputes.



The court of appeals' recognized the potential torrent of lawsuits and attempted to stem the tide by requiring plaintiffs to allege an intent to obstruct litigation. Pet. App. 62a. But that requirement is of little practical utility. Such allegations are "easy to allege and hard to disprove" (*Crawford-El*, 523 U.S. at 585), and can easily frustrate qualified immunity's goal of terminating litigation at the "earliest possible stage." (*Hunter*, 502 U.S. at 227). Such a rule is particularly unhelpful where privileged or classified information is involved, because the government official may actually "intend" to forestall litigation in the limited sense that he broadly intends to delimit any opportunities for and risks of disclosure—of which litigation is one. Accordingly, the court of appeals' rule would largely eliminate qualified immunity in the situation where it is most vital—in the handling of sensitive national security information. Cf. *Halperin* v. *Kissinger*, 807 F.2d 180, 187-188 (D.C. Cir. 1986) (Scalia, Circuit Justice) (adopting a purely objective qualified immunity inquiry for national security cases).

Nor is it a sufficient answer, as the court of appeals suggests (Pet. App. 24a), that government officials can answer informational inquiries with a terse "no comment" and a rigid refusal to assist members of the public. As an initial matter, it is unfathomable that the Founders silently carved into the Constitution such stultifying procedures for communications between citizens and their government. Furthermore, the perhaps unfortunate reality is that the issuance of incomplete information and even misinformation by government may sometimes be perceived as necessary to protect vital interests. *California Motor Transp.*, 404 U.S. at 513 ("Misrepresentations" may be "condoned in the political arena."). Circumstances may require the issuance of false information, for example, about the location and schedule of the President and other high-level government officials, the existence of intelligence operations or contacts with foreign

government officials, or the existence, character, scope, and targets of an ongoing law enforcement investigation. Unless the government adheres to an across-the-board refusal to respond to any requests for information in such areas (again, hardly something the Constitution should be held to require), the public might soon learn to equate a selective "no comment" response with an admission that sensitive governmental operations or programs are underway.[15]

### B. Any Arguable Constitutional Obligation To Disclose Foreign Relations And Intelligence Information In Response To An Informal Request For Assistance Was Not Clearly Established

Even if petitioners' actions somehow violated the constitutional right of access to the courts, the petitioners are entitled to qualified immunity because that right was not clearly established when the alleged conduct is said to have occurred. For a right to be "clearly established" under qualified immunity analysis, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987). "[I]n the light of pre-existing law the unlawfulness must be apparent." *Ibid.* If government officials "of reasonable competence" could disagree on whether the action is illegal, "immunity should be recognized." *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986).

Applying that standard, petitioners should have been accorded qualified immunity because "the constitutional

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[15] Congress recognized this problem when, in FOIA, it expressly authorized the government to offer an effectively misleading response to certain document requests if any other response would reveal highly privileged law enforcement information. See 5 U.S.C. 552(c) (allowing the government, under specified circumstances, to "treat the records as not subject to" FOIA and thus to state that no records responsive to the FOIA request exist); United States Dep't of Justice, *Freedom of Information Act Guide and Privacy Act Overview* 454-455 (May 2000).



question presented by this case is by no means open and shut." *Wilson* v. *Layne*, 526 U.S. 603, 615 (1999). First, for the reasons discussed above, "it is not obvious from the general principles" (*ibid.*) of the right of access to the courts that the extra-judicial withholding of information in response to an informal request by an unincarcerated individual would run afoul of that right. To the contrary, "the contours of the right of judicial access could best be described as 'nebulous.'" *Foster* v. *City of Lake Jackson*, 28 F.3d 425, 430 (5th Cir. 1994).

Second, controlling decisions of this Court pointed in the opposite direction, refusing to supplement the right of access with any generalized duty to provide information. Additionally, there was no controlling precedent from the District of Columbia Circuit, and the authority from other circuits arose in a substantially different factual and legal context. Both *Bell* and *Ryland* involved the *fabrication and falsification* of *evidence* of a *crime* by persons acting in violation of their *legal duties* not to alter such evidence and with the intent to frustrate *colorable* and eminently *foreseeable* causes of action for judicial redress. Here, by contrast, government officials, who were laboring under no legal duty to disclose the requested material and in fact were legally obligated not to disclose classified or privileged information, simply withheld nonpublic foreign affairs and intelligence information in response to an informal request for assistance, and did so without any legally viable cause of action discernible on the horizon. There thus was no "consensus of cases" (*Wilson*, 526 U.S. at 617) establishing the unlawfulness of petitioners' conduct. Surely petitioners were not obligated to be more "creative or imaginative in drawing analogies from previously decided cases," *Jenkins* v. *Talladega City Bd. of Educ.*, 115 F.3d 821, 827 (11th Cir. ), cert. denied, 522 U.S. 966 (1997), than the district court (Pet. App. 43a-49a) and

Judges Henderson and Sentelle (*id.* at 70a-71a), who likewise considered the few appellate precedents to be inapposite.

### C. The Existence Of An Alternative Remedial Scheme For Obtaining Information From The Federal Government Precludes Inference Of A *Bivens* Action

The existence of statutory avenues for obtaining information from the government not only obviates the need to constitutionalize this area of the law, but *a fortiori* demonstrates that there is no need for the Court to infer a *Bivens* remedy for any constitutional right that may exist. This Court has consistently refused to infer a *Bivens* remedy where Congress already has established an alternative statutory mechanism for addressing the relevant problem. See, *e.g.*, *Correctional Servs. Corp.* v. *Malesko*, 122 S. Ct. 515, 520 (2001).[16]

In *Bush* v. *Lucas*, 462 U.S. 367 (1983), this Court refused to recognize a *Bivens* action for First Amendment violations arising out of federal employment because the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, already provided "comprehensive procedural and substantive provisions" for disputes arising out of the federal employment relationship and gave "meaningful remedies against the United States." 462 U.S. at 368. Likewise, *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988), foreclosed a *Bivens* remedy for due process violations in the administration of Social Security, even though Congress's statutory remedy largely restricted claimants to retrospective claims for benefits and excluded damages. *Id.* at 424-425. It was sufficient that "the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms," *id.* at 423, even if Congress left an "absence of statutory relief for a constitutional violation," *id.* at 421. Also, as noted above, the Court in *Malesko* recently refused to infer a *Bivens* remedy against government contractors. "So long as the plaintiff had an avenue for *some redress*," the Court explained, "bedrock principles of separation of powers foreclosed judicial imposition of a new substantive liability." 122 S. Ct. at 520 (emphasis added).

[16] Although this argument was not separately raised below, it is logically intertwined with the Questions Presented—especially given the relevance of alternative legal remedies to the constitutional question. As a pure question of law, it is also appropriately considered in light of this Court's recent admonition in *Malesko*, 122 S. Ct. at 519, that *Bivens* should not be expanded to new contexts.



A *Bivens* remedy should not be inferred here because Congress has created a comprehensive framework of statutory mechanisms for seeking information from the federal government. Of primary relevance, the Freedom of Information Act establishes procedures for any member of the public to obtain copies of non-exempt agency documents and records, and embodies "a general philosophy of full agency disclosure." *Department of Air Force* v. *Rose*, 425 U.S. 352, 360 (1976) (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965)). FOIA sets a time frame for agency responses and requires agencies to provide for expedited treatment where appropriate. See 5 U.S.C. 552(a)(6)(A) and (E) (1994 & Supp. V 1999). Judicial review of the agency's response is available, and the court can "enjoin the agency from withholding agency records and * * * order the production of any agency records improperly withheld." 5 U.S.C. 552(a)(4)(B) (1994 & Supp. V 1999). Where warranted, the court also "may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred." 5 U.S.C. 552(a)(4)(E).

The Privacy Act of 1974, 5 U.S.C. 552a (allowing access to governmental records pertaining to the requesting individual), the Government in the Sunshine Act, 5 U.S.C. 552b (open meeting requirements), and the Federal Advisory Committee Act, 5 U.S.C. App. at 1 (requiring access to meetings and records of federal advisory committees),

provide additional mechanisms for obtaining information about governmental programs and policies. Like FOIA, each of those statutes makes judicial review available to guarantee agency compliance and, with the exception of the Federal Advisory Committee Act, enumerates specific remedies for agency noncompliance. See 5 U.S.C. 552a(d) and (g); 5 U.S.C. 552b(b), (f)(2), (h) and (i); 5 U.S.C. App. § 10; *Public Citizen* v. *Department of Justice*, 491 U.S. 440 (1989) (assuming the existence of an implied cause of action to enforce the Federal Advisory Committee Act). Taken as a whole, those statutory provisions broadly regulate what government information members of the public can obtain, how they can obtain it, when agencies must respond, and what remedies are available for an agency's failure to comply.

Each statute also contains restrictions on the disclosure of privileged and classified information, including the types of foreign relations and intelligence information sought by respondent here. See 5 U.S.C. 552(b)(1), (3) and (7); 5 U.S.C. 552a(k)(1), (2) and (3); 5 U.S.C. 552b(c)(1), (3) and (7); 5 U.S.C. App. § 10(b) and (d). With respect to intelligence information, in particular, Congress enacted the Central Intelligence Agency Information Act, 50 U.S.C. 431, to moderate FOIA's operation in that sensitive context. See generally *Sullivan* v. *CIA*, 992 F.2d 1249 (1st Cir. 1993) (limiting rights of next-of-kin requesters). Those statutes thus reflect—as a judicially inferred cause of action under *Bivens* cannot—a carefully calibrated congressional balance "between the right of the public to know and the need of the Government to keep information in confidence." *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 152 (1989). FOIA also reflects Congress's delicate remedial balance in authorizing injunctive relief and attorneys' fees, but *not* damages, for the improper withholding of information. This Court should be loath to upset that delicate balance by



superimposing a judicially crafted remedy, given the Constitution's express investment of national security matters in the political branches.[17]

In short, respondent was never "a plaintiff in search of a remedy." *Malesko*, 122 S. Ct. at 523. To the contrary, she at all times had available to her "an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations," *Bush*, 462 U.S. at 388, and that she acknowledges (Br. in Opp. 19 n.4) was capable of providing her all of the information to which she was legally entitled—if she had invoked the procedures in a timely manner.

Finally, supplementation of that elaborate and interlocking system of disclosure obligations would be doubly inappropriate here, because respondent predicates her claim for constitutional relief on an alleged intentional withholding of information pertaining to foreign affairs and intelligence operations. This Court will not infer a *Bivens* remedy where there are "special factors counselling hesitation." *Schweiker*, 487 U.S. at 423; see also *Bivens*, 403 U.S. at 396-397. In *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 273-274 (1990), this Court suggested that matters pertaining to foreign affairs and foreign activities could be special factors counseling hesitation in inferring a *Bivens* remedy, in light of the judiciary's traditional reluctance to delve into such matters. For similar reasons, this Court has declined to

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[17] See *Waterman S.S. Corp.*, 333 U.S. at 111 ("Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."); accord *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 165-166 (1803).

infer a *Bivens* remedy for actions incident to military service because "congressionally uninvited intrusion into military affairs by the judiciary is inappropriate." *United States* v. *Stanley*, 483 U.S. 669, 683 (1987).

The Executive Branch actions for which respondent seeks a judicially imposed *Bivens* remedy all pertain to the withholding of and communications about the United States' relations with a foreign government, intelligence operations and activities between the two governments, the existence of alleged CIA operatives or paid informants within a foreign government, and the knowledge of United States officials about the foreign government's treatment and interrogation of a foreign national engaged in insurrection against a recognized foreign government. Few matters could be less appropriate for judicial superintendence. That fact would have been obvious had respondent filed a timely FOIA request or attempted a timely lawsuit. The result should be no different because respondent instead has asked the courts to mint a novel constitutional tort.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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